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BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION,

Petitioners,

v.

DIVISION OF OIL, GAS, & MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH,

Respondent/Intervenors.

PERMITTEE'S MEMORANDUM OPPOSING PETITIONER'S MOTION FOR A HEARING EXAMINER

Docket No. 2009-019

Cause No. C/025/0005

Alton Coal Development, LLC ("**Alton**") by and through counsel and pursuant to Utah Administrative Code R641-105-300 submits this PERMITTEE'S MEMORANDUM OPPOSITING PETITIONER'S MOTION FOR A HEARING EXAMINER in the above-

captioned formal adjudicative proceeding before the Utah Board of Oil, Gas & Mining ("the Board").

Alton requests that this matter be heard by the full Board rather than a hearing examiner. A lengthy hearing before an appointed examiner is both unrealistic and unnecessary. A hearing examiner is not necessary to take evidence in this appeal because the Division, in processing Alton's mine application, has created an extensive administrative record, culminating in its Decision Document and Technical Analysis dated October 15, 2009. This record explains, in detail, the reasons for the Division's decision. Sierra Club argues that the Board should appoint a hearing examiner to decide contested matters of procedure, take evidence and recommend findings of fact and conclusions of law. *See* Petitioner's Memorandum in Support of Their Motionfor a Hearing Examiner at 2.

In an alarming insight into its unfounded expectations for a lengthy hearing on the merits, Sierra Club suggests that such a procedure might abbreviate the hearing by "several days." *Id.* The expectation that any hearing need exceed several days is unrealistic. Alton vigorously disputes that a hearing before either the Board or an examiner would require several days, let alone that using an examiner could reduce the duration of a hearing by that amount. The following paragraphs explain, first, that use of a hearing examiner is inconsistent with governing law for coal mine permit hearings, and second, that any efficiencies gained by using a hearing examiner can be realized as readily by a strict observance of the burdens of proof and standards of review applicable to this matter.

I. REFERRING THE HEARING IN THIS MATTER TO A HEARING EXAMINER IS INCONSISTENT WITH THE UTAH COAL MINING & RECLAMATION ACT

The Utah Coal Mining & Reclamation Act ("UCMRA") does not allow for the appointment of a hearing examiner in an appeal to the Board from the Division's final decision

to issue a coal permit. When the Board conducts a hearing on a coal mine permit, it operates under different statutory authorization than those which govern its usual proceedings pursuant to the Oil and Gas Conservation Act. The Board is authorized generally under the Conservation Act to employ hearing examiners to take evidence and recommend findings of fact and conclusions of law to the Board. See Utah Code § 40-6-10(6)(a) (LexisNexis 2009). However, the specific terms of UMCRA do not repeat or reference this authority.[1] To the contrary, UCMRA states that the powers it delegates to the Board shall be "[in] addition to those provided" in the Utah Mined Land Reclamation Act, but there is no similar incorporation of powers from the Conservation Act. Utah Code § 40-10-6. Under UCMRA, hearings on permit appeals are to be "formal adjudicative proceedings." § 40-10-6.7(2)(a)(i). Adjudicative proceedings under UCMRA are limited to "division or board action[s] or proceeding[s]." § 40-10-3(1)(a). Therefore, a proceeding before a hearing examiner rather than the Board, even if authorized by rules promulgated under the authority of the Conservation Act, cannot comply with the more specific limits of UCMRA and is not authorized.

Indeed, the language of UCMRA conflicts with the Conservation Act's provision for a hearing examiner, at least with respect to appointing any Division staff member as such an examiner. Utah Code Section 40-6-10(6)(b) states that "[a]ny member of the board, division staff, or any other person designated by the board may serve as a hearing examiner." To the contrary, UCMRA at Utah Code Section 40-10-3(4) provides that "Board means the Board of Oil, Gas, and Mining and the board shall not be defined as an employee of the division" and Section 40-10-3(7) provides that "employee means those individuals in the employ of the

[1] Alton concedes that the Oil and Gas Conservation Act is the Board's "Organic Act" for the purposes of determining the general purpose of the Board's existence and scope of its authority. Because UCMRA contains authorization specific to the matter at hand, however, canons of statutory construction require determining the Board's powers according to UCMRA. See Thomas v. Color Country Mgmt., 2004 UT 12 ¶ 9.

division and excludes the board." Under UCMRA a member of the Division cannot act as the "Board" even if she could under the Conservation Act. This inconsistency suggests that UCMRA does not contemplate use of hearing examiners as authorized by the Board's Organic Act. The full Board, as defined by UCMRA, should hear this matter, and Sierra Club's request should be denied.

II. THE BOARD CAN ACHIEVE THE EFFICIENCIES OFFERED BY A HEARING EXAMINER IF IT CONDUCTS ITS HEARING IN STRICT OBSERVANCE OF THE APPROPRIATE BURDENS OF PROOF AND STANDARD OF REVIEW

The issues presented by Sierra Club's appeal, while technical, are certainly not more complex than those raised in proceedings under other statutes the Board is charged with administering. Those issues rarely require more than a single day to resolve.[2] Rather than refer taking of evidence to a hearing examiner, the better method for this Board to expeditiously conduct and conclude a hearing on the merits is to strictly observe the applicable burdens of proof and standard of review. The Sierra Club, as the party challenging the Division's decision, bears the burden of proving that the decision was incorrect. See 30 C.F.R. § 775.11(b)(5) (2008); See Bd. of Oil, Gas & Mining, Order Concerning Scope and Standard of Review 3–5, Docket No. 2009-019 (Jan. 13, 2010). In disputed matters involving substantial scientific or technical judgment, the Board will not substitute its judgment for that of the Division, but will defer unless the judgment is arbitrary and capricious, clearly erroneous, or an abuse of discretion. Id. For the hydrological, biological, or other technical questions presented, therefore, evidence that other measurements or methods would have been available, feasible, or even preferable is insufficient to justify reversing the Division's determination, and the Board need not hear testimony or consider exhibits to that effect. Therefore, Respondents will be entitled to object to testimony or

[2] Admittedly, oil and gas spacing or pooling matters, for example, rarely raise more than two or three technical issues in a single hearing, rather than the multiple issues raised by Sierra Club. Both Alton and

other evidence that does not, if shown to be true, demonstrate error or arbitrariness in the Division's determinations.

A review of Sierra Club's discovery requests shows that most evidence it hopes to discover falls in this category. See Petitioners' Motion for Leave to Conduct Discovery Ex. 1-5 (Jan. 15, 2010). The Board should not waste its time hearing such evidence. Rather, Sierra Club must turn to the permit application and related documents and prove error in the decisions reached in those documents, not merely that some other approach to reaching the decisions might have been preferable. Because of this burden and standard of review, the Board would be permitted, if not obliged, to grant motions to exclude such evidence as irrelevant and immaterial. See Utah Admin. Code R641-108-201 (On its own motion or that of any party, the Board "[m]ay exclude evidence that is irrelevant, immaterial, or unduly repetitious.") Alton urges the Board to insist that all parties closely focus their evidentiary presentations on the permit application and related documents, refraining from offering irrelevant evidence and arguments regarding other methods and approaches to sampling and analysis without first showing error in the approach taken. Strict enforcement of this rule will permit the Board to conduct a just, speedy, and economical hearing offering all parties a full opportunity to identify either the strengths or weaknesses of the Division's decision.[3]

III. CONCLUSION

For the foregoing reasons, this Board should deny Sierra Club's request for a hearing examiner and set this matter for hearing by the full Board without further delay.

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the Division have pending dispositive motions, however, that may significantly reduce the number of issues requiring an evidentiary hearing.

[3] Sierra Club's proposal will not streamline these proceedings. A hearing examiner may only prepare "proposed" findings of fact and conclusions of law which must be adopted by the Board. Therefore, using the hearing examiner procedure inevitably adds an additional level of review, with an unavoidable requirement that the Board provide for public for notice and additional opportunity for hearing.

RESPECTFULLY SUBMITTED this 25th day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2010, I mailed a true and correct copy of the foregoing **PERMITTEE'S MEMORANDUM OPPOSING PETITIONER'S MOTION FOR A HEARING EXAMINER** via e-mail and United States mail, postage prepaid, to the following:

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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF SUWA, ET AL. TO APPEAL THE DECISION BY THE DIVISION OF OIL, GAS AND MINING TO APPROVE THE APPLICATION OF EARTH ENERGY RESOURCES TO CONDUCT TAR SANDS MINING AT THE PR SPRINGS MINE	**MOTION TO CONTINUE HEARING** **Docket No. 2010-009** **Cause No. M/047/0090**

Southern Utah Wilderness Alliance (SUWA), and Utah Chapter of the Sierra Club (Sierra Club) (collectively SUWA), pursuant to Utah Code Ann. § 40-6-6, hereby move the Utah Board of Oil, Gas and Mining (Board) to enter an order continuing this matter until the Board's regular hearing scheduled for March 24, 2010. SUWA requests this continuance because Petitioners' attorneys have an out-of-town appointment in another matter on February 24, 2010, the date this matter is currently scheduled before the Board. Attached is a Proposed Order Continuing the Hearing.

Respectfully submitted this 22nd day of January, 2010.

ROB DUBUC
JORO WALKER
Attorneys for SUWA

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January 2010, I served a true and correct copy of Request for Continuance and Proposed Order by Petitioners Southern Utah Wilderness Alliance, et al., to each of the following persons via first-class mail, postage pre-paid:

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